Supreme Court, U.S.
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No. 99-1647

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICAN TARGET ADVERTISING, INC.,

Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the First Amendment?

2. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the Due Process Clause of the Fourteenth Amendment?

3. Do the registration requirements for professional fund raising consultants under Utah's Charitable Solicitations Act violate the Commerce Clause?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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OPINIONS AND ORDERS

The decision of the United States Court of Appeals for the Tenth Circuit sought to be reviewed is reported at 199 F.3d 1241 (10th Cir. 2000) (reproduced in the Appendix to American Target's Petition, Cert. App. 1a). The judgment of the United States District Court for the District of Utah reviewed by the court of appeals is reported at 23 F.Supp.2d 1303 (D. Utah 1998) (Cert. App. 21a).

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals sought to be reviewed was entered on January 13, 2000. This Court has jurisdiction to review on a writ of certiorari the judgment of the United States Court of Appeals under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions, statutes, and regulations that are relevant to a determination of this case are set forth below.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 to -21 (1953, as amended), is set out in the appendix to American Target's petition, Cert. App. 37a-63a.

Rule 152-22-4(3), promulgated by the Division under the Charitable Solicitations Act, provides:

> All initial applications and renewals of registration in accordance with Section 13-22-12(5) shall be processed within 10 business days of their receipt by the division.

STATEMENT OF THE CASE

Procedural Background

Pursuant to 28 U.S.C. 1331, American Target Advertising, Inc. filed an action in the United States District Court for the District of Utah against Francine A. Giani in her official capacity as Director of the Utah Division of Consumer Protection ("Division"). Cert. App. 1a; CA10 App. 2.[1] American Target sought damages under 42 U.S.C. § 1983, various injunctive relief, and a judgment from the district court

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[1]Matters found in the Appendix filed in the Tenth Circuit are cited as "CA10 App." followed by the appendix page number.

under 28 U.S.C. § 2201 declaring the Utah Charitable Solicitations Act unconstitutional. Cert. App. 1a-2a; CA10 App. 2. After the parties filed cross-motions for summary judgment, the district court granted the Director's motion and the action was dismissed. Cert. App. 1a-2a, 36a.

American Target timely appealed the judgment of the district court to the Tenth Circuit. Cert. App. 2a. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the court of appeals affirmed the judgment in part and denied the judgment in part. Cert. App. 2a. The court rejected American Target's claims that the Act violates the Due Process Clause and Commerce Clause of the United States Constitution. Cert. App. 17a-20a. The court also held that all but three provisions of the Act comported with the First Amendment. Cert. App. 2a-17a. American Target timely filed a petition for writ of certiorari.

Fundraising by American Target

American Target is a Virginia corporation that provides fundraising services to various nonprofit organizations, including Judicial Watch, Inc, a "political watchdog" organization based in Washington, D.C. Cert. App. 2a, 23a. Judicial Watch retained the services of American Target to "build a national base of supporters across the country." CA10 App. 397-98.

Directing Fundraising. Under its agreement with Judicial Watch, American Target is generally responsible for all direct mail packages seeking financial contributions. CA10 App. 16. American Target consults and advises Judicial Watch regarding

its solicitations and other communications to the public. CA10 App. 16-17. American Target prepares the creative copy and design of mailings. CA10 App. 16-17. American Target acts as Judicial Watch's disclosed agent in acquiring production services relevant to direct mail solicitations, including the ordering of services and materials from vendors and suppliers. CA10 App. 16-17. Judicial Watch relies on American Target to select lists for potential donors and identify dates when mailings should occur. CA10 App. 16-17. Moreover, American Target is Judicial Watch's exclusive list broker for all solicitations performed under the agreement. CA10 App. 16-17.

Fees. American Target receives 8¢ for each direct mail solicitation in Utah and any other state and 7¢ for each newsletter or thank you letter. CA10 App. 19. American Target also receives $1.00 for every person that participates in a monthly giving program established by the parties up to $5,000.00 per month. CA10 App. 19. American Target receives 10¢ for each name rented by Judicial Watch from the "Agency Masterfile" other than those names developed under the agreement. CA10 App. 21. However, Judicial Watch is responsible for costs and expenses only to the extent sufficient contributions are received to cover those bills. CA10 App. 27.

Disbursement of Contributions. Payment for American Target's services is directly tied to contributions. CA10 App. 27. Contributions are not sent directly to Judicial Watch. Instead, contributors send donations to an escrow account administered by an agent and pursuant to an agreement approved by both American Target and Judicial Watch. CA10

App. 17. The escrow agent disburses funds, first, to American Target for cost advances, and second, to vendors and suppliers, including American Target, for the costs associated with the mailings. CA10 App. 17-18. A portion of what is left is held in reserve for future costs. CA10 App. 17-18. Only then, after the payment of advances, costs, and fees, and the reservation of money for future costs, are any remaining funds disbursed to Judicial Watch. CA10 App. 17-18.

Utah Charitable Solicitations Act

The Utah Charitable Solicitations Act requires registration of professional fundraisers and consultants (collectively referred to as "fundraising professionals") who provide fundraising services in connection with solicitations in Utah. Utah Code Ann. § 13-22-5. The Act requires professional fundraisers and consultants to submit to the Division an application, together with a $250 registration fee, before solicitation begins.[2] Utah Code Ann. § 13-22-9.

In its application, the consultant must disclose:

> (1) simple identifying information about the consultant, its officers, directors, registered agent, and affiliates (e.g., name, address, telephone number, facsimile number, and the type of entity);

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[2]The Tenth Circuit held that the Act's bond provision violated the First Amendment. Cert. App. 7a-9a. The Director has filed a conditional cross-petition seeking review of that decision in the event this Court grant's American Target's petition.

(2) whether or not any injunction, judgment, administrative order, or criminal conviction involving moral turpitude has been entered against the consultant or against any of its officers, directors, managers, operators, or principals;

(3) the purpose of the consulting services, the intended use of the contributions solicited, the method by which the consulting services will be organized, and the projected length of time of the solicitation;

(4) the total fees charged by the consultant and the expenses the consultant anticipates it will incur for its services, including the payment of commissions, salaries, and collection costs;

(5) the projected percentage of contributions that will be available to the charity after the payment of expenses, including fees paid to the consultant; and

(6) certain historical information about the consultant, including the nature of the consultant's business during the preceding three years and the total net fees earned and expenditures made by the consultant in the previous calendar year.

Utah Code Ann. § 13-22-9(1)(b). In addition to the foregoing disclosures, the consultant is required to provide copies of various documents reflecting its status and its relationship with the charity, including organizational documents, its IRS tax exempt letter (if applicable), and contracts and other documents

pertaining to its relationship with the charity. Utah Code Ann. § 13-22-9(1)(b)(x) & (xii); Utah Admin. Code R152-22-4(2).

Registration by American Target and Judicial Watch

Although Judicial Watch is registered with the Division as a charity that solicits contributions from Utah residents, American Target has not registered as either a professional fundraiser or consultant. Cert. App. 2a, 23a-24a. Accordingly, Judicial Watch may not solicit contributions from Utah residents through American Target until and unless American Target registers with the Division. Utah Code Ann. § 13-22-6(1)(b)(xiv)(B); Cert. App. 2a.

Approximately twenty-nine professional fundraisers registered with the State during the 1994 fiscal year. CA10 App. 186-87. In 1997, ninety professional fundraisers and consultants registered with the State. CA10 App. 187.

PERCEIVED MISSTATEMENTS OF FACT OR LAW

American Target's Role in Fundraising

In its petition, American Target argues that the Act "regulates [American Target] solely because [it] gives advice and provides services to Judicial Watch to aid it in engaging in this highly protected form of speech." Cert. Pet. 11. American Target also claims that it "does no business in Utah, sends no letters into the state, and does not solicit Utah residents for funds." Cert. Pet. 2. American Target further characterizes its

involvement in fundraising as simply giving advice to its clients like Judicial Watch. *See* Cert. Pet. 3, 11.

American Target, however, does much more than counsel or give advice to Judicial Watch. Notwithstanding any language to the contrary, the agreement between American Target and Judicial Watch makes clear that American Target coordinates and directs the fundraising on behalf of Judicial Watch and is directly compensated from contributions. As found by the district court, under its contract with Judicial Watch, "American Target (1) prepares the creative copy and design of the mailings, (2) plans and manages the production services relevant to direct mail solicitations, (3) selects lists of potential donors and identifies dates when mailings should occur, and (4) generally advises Judicial Watch regarding the solicitations." App. 50 (*citing* section 1 of Agreement, CA10 App. 16-17). American Target is also Judicial Watch's exclusive list broker for all solicitations performed under the agreement. CA10 App. 16-17.

Moreover, American Target receives 8 cents for each direct mail solicitation in Utah and any other state and 7 cents for each newsletter or thank you letter. CA10 App. 19. Tellingly, however, Judicial Watch's obligation to American Target for these fees is directly tied to funds raised. Judicial Watch bears "no financial risk" under the contract. CA10 App. 27. Judicial Watch has an obligation to "pay" for American Target's services "only to the extent that money comes in from mailings under the [ ] contract or from contributors or other respondents developed under the [ ] contract." CA10 App. 27.

Finally, contributions raised by American Target are not sent directly to Judicial Watch, but instead are deposited into an escrow account managed by an escrow agent mutually selected by American Target and Judicial Watch. CA10App. 17. American Target is the first to receive funds from contributions. These contributions are *first* distributed to American Target for advances and fees and to vendors and suppliers secured by American Target for the production of the direct mail solicitations. CA10 App. 16-18. Then, after holding out an additional portion for future costs, the remaining contributions are disbursed to Judicial Watch. CA10 App. 17-18.

American Target is therefore much more than an "advice-giver" as it seems to characterize itself. *See* Cert. Pet. at 13. Rather, the burden to coordinate, direct, and manage fundraising for Judicial Watch rests with American Target. *See* CA10 App. 398.

American Target unwittingly acknowledges the extent of its fundraising role in its own petition, quoting one author's observation that American Target's predecessor "and its scores of imitators and spin-off firms have played a significant role in raising money to elect conservative candidates." Cert. Pet. 10, n. 7. Indeed, Richard Viguerie, American Target's chairman and founder, is regarded as having "virtually invented an industry–political fundraising through direct mail." *About the publisher: Richard Viguerie*, New Media News Corp.(visited May 5, 2000) <http://www.newmediareport.com/rbio.shtml>.[3]

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[3]Viguerie did so in the 1960s "by creating the first political direct mail lists by hand (he copied registered voters names and addresses from little-

Application of the Act

In its petition, American Target asserts that the Act "directly targets the First Amendment activities of advice-giving and direct mail expression." *See* Cert. Pet. at 11, 13.[4] This claim is without merit.

The Act is not triggered by the mere mailing of informative or persuasive literature into Utah. The registration requirements for fundraising professionals are triggered ***only if*** the charity, through its fundraising professional, ***solicits contributions in Utah***. Utah Code Ann. § 13-22-5. No registration is required if American Target simply mails letters into Utah on behalf of its client charity—whether the letters address social, religious, or political topics, and whether their purpose is to inform or persuade. The Act, therefore, is not a mere attempt by the State to license core political speech as suggested by American Target, but rather a means to regulate those who participate in soliciting charitable contributions from Utah residents.

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known public sources, then resold these lists thousands of times to political candidates to build a multi-million dollar political fundraising business)." *Id.*

[4] In its due process claim, American Target also incorrectly asserts that "the trigger for regulation is that those entities engage in core political activities protected by the First Amendment." Cert. Pet. at 19.

REASONS FOR DENYING THE PETITION

"A petition for a writ of certiorari will be granted only for compelling reasons." S.Ct. R. 10. American Target has not demonstrated that the decision of the court of appeals conflicts with the decision of another court of appeals on the same issue. *See* S.Ct. R. 10(a). American Target has also failed to establish that the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c). Nor has American Target established any other compelling reason for this Court to grant its petition. Accordingly, American Target's petition should be denied.

I. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Holding That the Act Comports with the First Amendment.

The focus of American Target's petition is the Tenth Circuit's decision upholding as constitutional under the First Amendment all but three provisions of the Act. However, American Target fails to demonstrate that the court of appeals departed from this Court's First Amendment decisions. Nor has American Target demonstrated that the law is otherwise unsettled. Accordingly, the petition should be denied.[5]

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[5] American Target has throughout this litigation only argued that the Act burdens its client's free speech rights. It has not, until now, Cert. Pet. at 9-13, seriously argued that its own First Amendment rights were violated.

A. The Registration Requirements for Fundraising Consultants Are Content-Neutral.

American Target argues that the court of appeals erroneously concluded that the Act was content neutral, contending that the Act applies to it "only because of the content of [its] advice and of the speech of [its] clients." Cert. Pet. at 14. However, American Target does not even attempt to explain this position, jumping instead to its claim that the court of appeals should nevertheless have applied strict scrutiny. Cert. Pet. at 14-15. Therefore, American Target has failed to demonstrate any reason for this Court to review the Tenth Circuit's conclusion that the Act is content neutral.

In any case, however, American Target's claim that the Act is a content-based regulation lacks merit. The Act applies to all fund raising consultants who direct and coordinate solicitations in Utah, regardless of the content of the speech. The Act has nothing to do with the underlying messages or causes for which the solicitations are being made, but rather focuses on ensuring forthright, honest, and verifiable representations in the solicitation process. Thus, registration is required whether the

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Accordingly, because American Target's First Amendment interests have neither been adequately raised or argued below, nor decided upon by the Tenth Circuit, review should not be granted on that issue. *See Powell v. Nevada*, 511 U.S. 79, 85 fn. (1994) (refusing to address a claim "[b]ecause the issue was not raised, argued, or decided below"). Indeed, regulations governing American Target's First Amendment rights with respect to its business relationships would be examined under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

solicitations seek financial support for Al Gore's presidential campaign or George W. Bush's campaign. The content has nothing to do with application of the Act or its purpose.

This Court has long held that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (*citing City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 47-48 (1986)). The court of appeals correctly observed that the Act "targets the secondary effects of professional solicitations, i.e., increased fraud and misrepresentation." Cert. App. 4a. The express purpose of the Act, and of all other laws in Title 13, is "to protect [Utah] citizens from harmful and injurious acts by persons offering or providing essential or necessary goods or services to the general public." *See* Utah Code Ann. § 13-1-1. The Act itself is replete with provisions designed to protect both the pubic and charities against fraud, breach of fiduciary duty, and misrepresentations. *See* Utah Code Ann. §§ 13-22-12(1)(b) (i), (ii), and (v); Utah Code Ann. § 13-22-13(3).

In short, the justifications for Utah's registration requirements have nothing to do with content, i.e., the desire to protect the public (and charities) from fraud has nothing to do with the actual literature being sent to Utah residents. *See Boos v. Barry*, 485 U.S. 312, 320 (1988). As such, the Act was properly analyzed by the court of appeals as content neutral.

B. As a Content-Neutral Regulation, the Registration Requirements Are Subject to Intermediate Scrutiny.

American Target suggests that strict scrutiny applies simply because core political speech may be implicated. Cert. Pet. at 8, 15. In a closely-related argument, American Target argues that the First Amendment requires the State to choose the least restrictive means to further its interest because the Act does not regulate the time, place, or manner of the speech. Cert. Pet. at 8, 13. However, these arguments ignore well-settled First Amendment jurisprudence. Following this Court's precedents, the court of appeals correctly applied intermediate scrutiny to Utah's content-neutral regulation.

In *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994), this Court held that content-neutral regulations "are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." 512 U.S. at 642. Accordingly, in *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989), the Court observed that it "ha[s] refrained from imposing a least-restrictive-means requirement—even where core political speech is at issue—in assessing the validity of so-called time, place, and manner regulations." The Court continued:

> Similarly with respect to government regulation of expressive conduct, ***including conduct expressive of political views***. In requiring that to be "narrowly tailored" to serve an important or substantial state

> interest, [the Supreme Court] ha[s] not insisted that there be no conceivable alternative, but only that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests."

Fox, 492 U.S. at 478 (citations omitted) (emphasis added). As such, whether the Act regulates the "time, place, or manner" of speech, or has an incidental impact on speech, intermediate scrutiny applies and the State need only establish that the regulation (1) serves a legitimate or substantial state interest, and (2) is narrowly tailored to that interest. *Ward*, 491 U.S. at 798.

That intermediate scrutiny is the appropriate standard by which the Act should be reviewed is evident from this Court's decision in *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). In reviewing a North Carolina provision that prohibited professional fundraisers from retaining an unreasonable or excessive fee, the Court held that the state's "interest in protecting charities (and the public) from fraud . . . is a sufficiently substantial interest to justify a narrowly tailored regulation." 487 U.S. at 792. The Court, therefore, used the intermediate standard in its review of the fee requirement. In that same case, however, the Court applied strict scrutiny to the North Carolina requirement that fundraisers disclose to the potential donor, before an appeal for funds, the percentage of contributions that would be turned over to the charity. The Court held that because it mandated speech, it was a "content-based regulation [ ] subject to exacting First Amendment scrutiny." *Id.* at 798.

As a content-neutral regulation, therefore, the Act was properly reviewed by the court of appeals under an intermediate scrutiny standard.

C. The Registration Requirements Are Narrowly Tailored to the State's Legitimate and Substantial Interest in Protecting the Public and Charities from Fraud.

This Court has been "loathe to second-guess the Government's judgment" regarding the extent of regulation necessary to further its content-neutral interest. *Id.* "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799. The court of appeals correctly concluded that the registration requirements meet that test.

In its petition, American Target in essence asks this Court to strike regulations that have any impact on political expression, regardless of the purpose of the regulation. As discussed above, this is not the law. Thus, in *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980), this Court held that although charitable appeals implicate a variety of speech interests that are protected by the First Amendment, "[s]oliciting financial support is undoubtedly subject to reasonable regulation."

American Target cites this Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), for the proposition that because political expression is involved, the State's distinction between

paid consultants and unpaid consultants violates the First Amendment. Cert. Pet. at 12-13. American Target, however, did not challenge this distinction below nor did the court of appeals otherwise address the distinction. *See* Cert. App. 1a-20a. Accordingly, review on this issue is not appropriate. *See Powell*, 511 U.S. at 85 fn. In any event, however, *Meyer* involved Colorado's prohibition against paying circulators of initiative or referendum petitions. *Meyer*, 486 U.S. at 417. In invalidating the statute, the Supreme Court concluded that Colorado's "interest in protecting the integrity of the initiative process" did not justify the absolute prohibition. *Id.* at 426. The Utah Act does not ban the use of fund raising consultants, but only requires that they register.

This Court has on at least two occasions indicated that registration requirements are consistent with the First Amendment.

Schaumberg. In *Schaumberg*, the Court reviewed an ordinance requiring that at least 75 percent of the proceeds from charitable solicitations be directly used for the charitable purpose. *Schaumberg*, 444 U.S. at 625. Any solicitor who did not so demonstrate could not receive a permit. *Id.* The regulation, therefore, directly dictated *how* proceeds should be used. In striking the regulation, the Court rejected the underlying premise of the regulation: that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent." *Id.* at 636.

The Court concluded that "[t]he Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation." The Court then proceeded to list measures that would withstand constitutional scrutiny:

> Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. ***Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.*** Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

Id. at 637-38 (citations and footnotes omitted) (emphasis added). In discussing efforts to promote disclosure, the Court cited to Illinois law requiring charitable organizations to register and "report certain information about their structure and fundraising activities." *Id.* at 638 n. 12.

Riley. In *Riley*, this Court once again acknowledged the propriety of registration and disclosure requirements. In striking North Carolina's point-of-solicitation disclosure requirement, the Court stated that its holding "did not suggest that States must sit idly by and allow their citizens to be defrauded." *Riley*, 487 U.S. at 795. The Court observed that in addition to enforcing antifraud laws, "North Carolina may constitutionally require fundraisers to disclose certain financial

information to the State, as it has since 1981." *Id.* The Court further observed that the State could then publish these "detailed financial disclosure forms" so the public could receive the desired information "without burdening a speaker with unwanted speech during the course of a solicitation." *Id.* at 800.

The Utah Act provides for just such disclosures to further Utah's legitimate and substantial interest in protecting both the public and charities from fraud. Cert. App. 4a-5a (*citing Riley*, 487 U.S. at 792). Accordingly, the Tenth Circuit's decision upholding the registration and disclosure requirements is in keeping with this Court's decisions in *Riley* and *Schaumberg*.

D. The Registration Requirements Comport With This Court's Prior Restraint Decisions.

American Target also claims that the Act is a prior restraint subject to a least-restrictive-means analysis. Cert. Pet. at 13-14. American Target, however, cites to no authority supporting such a conclusion. Prior restraints, as the court of appeals properly observed, are governed by this Court's decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), and its progeny. *See* Cert. App. 16a. American Target correctly observes that although the Act imposes no deadline within which the Division must act on an application, rules promulgated by the Division have imposed such a deadline (10 days). The court of appeals concluded that the 10-day deadline was consistent with *Freedman*. Cert. App. 16a-17a. American Target has not cited any authority to the contrary nor has it even argued that the 10-day time limit is insufficient. Indeed, Utah's 10-day limit

appears to satisfy the concerns expressed by this Court in *Riley*. *See Riley*, 487 U.S. at 801-02 (striking North Carolina's licensing requirement because it failed to impose any time limit on the State's determination of a license application).

American Target also complains that review of the Division's decision on an application carries no deadline or other procedural safeguard. Cert. Pet. at 14. That issue, however, was not raised, argued, or otherwise decided below. Accordingly, this Court should not address it now for the first time on certiorari review. *See Powell*, 511 U.S. at 85 fn.[6]

II. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Conclusion That the Act Comports with the Due Process Clause.

In its due process claim, American Target once again urges this Court to grant certiorari review based on an erroneous premise—that regulation of American Target is triggered by the exercise of First Amendment rights. *See* Cert. Pet. at 19-20. As discussed above, however, regulation is not triggered by the mere exercise of First Amendment freedoms, but by the solicitation of contributions from Utah residents. *See* Utah Code Ann. § 13-22-5(4).

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[6]Contrary to American Target's claim, the court of appeals did not address the application of *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), because American Target's "stray references" to the issue of judicial review in prior restraint cases were "insufficient to trigger appellate review." Cert. App. 16a, n. 7.

American Target hopes to hide behind the facade of a cleverly worded agreement, but in the end, even the agreement exposes American Target's true role in fundraising. American Target manages and directs the fundraising for Judicial Watch. As explained above, American Target prepares the creative copy and design for the mailings, plans and manages the production services relevant to direct mail solicitations, selects potential donors to whom mailings will be sent, and identifies the optimum mailing dates. *See* CA10 App. 16-17; Cert. App. 20a. In short, the burden of fundraising rests with American Target upon whose expertise Judicial Watch relies for successful solicitation campaigns. *See* CA10 App. 398.

Of even greater significance, however, is that American Target's efforts are purposefully directed toward Utah residents whom American Target identifies as sympathetic to the cause of its client and who are therefore more likely to contribute.[7] *See Burger King Corp. v. Rudeicz*, 471 U.S. 462, 476 (1985) (holding that "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, [the Court] ha[s] consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction"). Thus, for every letter sent into Utah, American Target receives a portion of the contribution made. *See* CA10 App. 19 (receiving 8 cents for each direct mail solicitation and 7 cents for each newsletter

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[7]This case comes to the Court in the context of an action seeking a declaratory judgment after Judicial Watch notified the State of its intent to solicit contributions in Utah through American Target. Cert. App. 23a-24a. However, because American Target had not registered with the State, it was precluded from pursuing its solicitation campaign for Judicial Watch. *Id.* Accordingly, no solicitations have apparently been made in Utah to date.

or thank you letter). Moreover, American Target is the first to receive moneys from contributions. *See* CA10 App. 17-18.

American Target asks this Court to draw a distinction between "adjudicative" and "legislative" jurisdiction, yet can cite to no precedent from this Court that would support the departure it seeks. *See* Cert. Pet. at 20. Instead, American Target cites to Justice Scalia's concurrence in *Quill Corp. v. North Dakota*, 504 U.S. 298, 319-20 (1992) (Scalia, J., concurring), that "the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical." Cert. Pet. at 20. However, American Target offers no insight on how the two should be treated differently. Moreover, it was in *Quill*—a case involving the state's jurisdiction to tax out-of-state entities—where this Court concluded "that if a foreign corporation avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State." *Quill*, 504 U.S. at 307. In its opinion, joined by Justice Scalia, the Court held:

> In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule

those holdings as superseded by developments in the law of due process.

Id. at 308. Because American Target will purposefully direct its solicitation efforts toward the residents of Utah, thereby availing itself of the benefits of the economic market in Utah, the court of appeals correctly concluded that American Target's activities are sufficient to subject it to the State's regulatory jurisdiction.

III. American Target Has Shown No Compelling Reason for this Court to Review the Tenth Circuit's Correct Conclusion That the Act Comports with the Commerce Clause.

Finally, American Target seeks review of the Tenth Circuit's decision that the Act does not violate the Commerce Clause. Cert. Pet. at 16. Again, American Target's claim rests largely on the fact that it is located in Virginia and has no employees in Utah. However, as explained above, American Target purposefully directs its solicitation efforts toward Utah residents whom it identifies as sympathetic to its client's cause and who are therefore likely to contribute.

American Target cites to this Court's decisions in *Quill* and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), for the proposition that the State may not regulate an out-of-state professional fund raising consultant whose only contact with Utah residents is through direct mail solicitations. Cert. Pet. at 18-19. As the court of appeals correctly observed, however, both *Quill* and *Bellas Hess* addressed a state's ability

to ***tax*** interstate commerce. *See* Cert. App. 18a-19a.[8] What this Court established in *Bellas Hess*, and reaffirmed in *Quill*, is "a bright-line rule in the area of sales and use taxes" only. *Quill*, 504 U.S. at 316. It extends no further.

The Utah Act regulates charitable solicitations; it is undisputably not a taxing statute and American Target does not claim otherwise. Accordingly, the *Bellas Hess/Quill* bright-line rule does not apply. Under that bright-line rule, the Commerce Clause prohibits a state from imposing sales and use taxes on a vendor whose only contacts with the taxing state are by mail or common carrier. *Id.* at 311-13. The Court expressly acknowledged in *Quill* the limited application of the bright-line rule, observing that it has "not adopted a similar bright-line, physical-presence requirement" in other types of Commerce Clause cases. *Id.* at 317. American Target has failed to cite to any authority extending that rule. Accordingly, the court of appeals properly rejected American Target's offer to impose the bright-line rule in this case.

As the court of appeals correctly observed, "[t]he Utah Act plainly does not distinguish between in-state and out-of-state businesses." Cert. App. 17a. In-state and out-of-state consultants alike are required to comply with the registration requirements. As discussed above, these registration requirements promote the State's legitimate and substantial interest in protecting both the public and charities from fraud

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[8]Both cases involved the state's attempt to require an out-of-state mail order house to collect and pay a use tax on goods purchased for use within the state. *Quill*, 504 U.S. at 301; *Bellas Hess*, 386 U.S. at 753.

and other harmful or injurious acts. Accordingly, the court of appeals correctly analyzed the Act under the principles set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

In *Pike*, this Court held that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. American Target has wholly failed to demonstrate how registration is "clearly excessive" to the benefits derived therefrom.

Registration entails the completion of a relatively simple 12-page application which, among other things, requires the consultant to: (1) identify the company and its managing personnel, (2) reveal adverse actions taken against them, (3) explain the company's history, function, and solicitation campaign plan, and (4) outline the expected costs and fees, as well as the percentage the charity is projected to receive. CA10 App. 190-201; *see* Utah Code Ann. § 13-22-9(1)(b). In addition, a $250 fee is assessed to defray the costs of administering the Act. Cert. App. 7a. This hardly represents a burden on interstate commerce.

On the other hand, the benefits of registration cannot be understated. In a day when many if not most of these solicitations originate hundreds if not thousands of miles away, making it difficult if not impossible to verify the legitimacy of the solicitation, the residents of Utah reap great benefits from registration. Through registration, residents are able to verify

representations made and ensure that their contributions are being used as represented. This benefit becomes apparent upon a simple review of the "product" or "good." In a commercial transaction, consumers can readily verify whether or not they have been defrauded by an examination of the product itself. However, upon making a charitable contribution, donors will likely never know whether or not their donation was actually used for the intended purpose. The risk of fraud and misrepresentation is much greater in this setting. Without registration requirements, Utahns are powerless to make informed decisions and protect themselves against fraud.

In short, American Target has failed to show any reason, much less a compelling reason, why this Court should review the court of appeals' decision that the Act does not violate the Commerce Clause.

CONCLUSION

For the reasons stated above, the Director requests the Court to deny American Target's Petition for Writ of Certiorari.

Respectfully submitted this 12nd day of May, 2000,

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